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ARTICLES

WHAT WAS A RIGHT OF ENTRY?

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FROM the 14th century to the 19th most claims to land were made in ways (increasingly tortuous) which depended upon the claimant having a right of entry. This was his procedural choice, the alternative to claiming the land by one of the old real actions.[1] But those actions were slow and troublesome, and few would use them unless they had to. In certain situations a claim might have to be enforced by action because the right of entry had been "tolled". The most prominent of these was the "descent cast" which will be mentioned later in this paper. But those situations were exceptional, and most claims were initiated by the exercise (or, later, the purported exercise) of a right of entry. So what was such a right?

Many of the facts are hidden, first behind blank general verdicts in assizes of novel disseisin in the 13th and 14th centuries, and then under sedimentary layers of technicality left by the expedients of lawyers through half a millennium. For much of that time the lawyers were no doubt working by rule of thumb, not worrying about any principle underlying this mass of learning. But it must have started from a principle, and this paper will propose a hypothesis about that starting-point. The proposition would not have seemed strange to Blackstone;[2] but for a century we have contented ourselves with a very different answer which, when thought through, stretches credulity to breaking-point.

It all turns on the assize of novel disseisin. On the traditional view this was conceived, perhaps in conscious imitation of the Roman possessory interdicts, as a summary (and royal) remedy enabling one recently dispossessed to get his land back without the palaver of the only pre-existing remedy, "the writ of right" (brought to his lord's court) which has been understood as claiming

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[1] There was no choice for one who had made a conditional grant. The condition gave him no right of action: if it was broken his only remedy was to enter; and the only other person who could enter was the grantor's heir.

[2] Below, n. 12.

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"ownership". The writ of novel disseisin asserted that the disseisin had been done "unjustly and without judgment" and the traditional view saw those words as meant to preclude extra-judicial self-help.[3] But self-help is the essence of a right of entry. If you had such a right you could assert your claim to the land by just going in. Not only was this not itself a disseisin: by going in with such a right you yourself became instantly seised, so that if your adversary (who might have been there peacefully and for a long time) at once put you out again, you could defeat him in an assize of novel disseisin. That instant magic was the essence of a right of entry.

Even Lewis Carroll's Red Queen, who could sometimes believe six impossible things before breakfast, might have had difficulty reconciling that with any idea of possessory protection; and she might not have been much comforted by the traditional explanation. The 13th-century *Bracton* would allow limited self-help to one disseised:[4] the victim had a short time (four days is mentioned) to get back in without himself being vulnerable to the assize. And though the time-limit must have lengthened out almost indefinitely, the essence of a right of entry has been thought to lie in a disseisor's wrongful possession not having lasted long enough to ripen into a protected seisin.[5] On this view it was not so much an asset in the party exercising the right as a liability in the party against whom it was exercised; and further explanation is needed if (as is the case) the mechanism was not confined to recovering land which had got into the wrong hands by a disseisin.

This traditional view is associated with an early paper by Maitland which, however, did not explicitly set out to investigate rights of entry. It started from a separate and almost Roman question: when, if ever, could the defendant in a possessory action rely upon his own title?[6] In his great *History* Maitland was later to make "Ownership and Possession" the heading of his chapter on property:[7] but reasons have been given elsewhere for thinking that an account based on these concepts can no longer be squared with the early evidence.[8]

[3] F. Pollock & F.W. Maitland, *History of English Law* (2nd edn. 1898), II, 52. Cf. F.W. Maitland, *The Forms of Action at Common Law* (edn. 1936), 28.

[4] *Bracton*, f. 163, ed. Thorne, esp. at III, 22.

[5] Unlike Maitland, the historian of novel disseisin gave no credence at all to the four-day limit itself. But he did not dissent in principle; he still assumed that what mattered was lapse of time, but thought the length of time was a matter of discretion: D.W. Sutherland, *The Assize of Novel Disseisin* (Oxford 1973), esp. 97–104.

[6] "The Beatitude of Seisin" (1888 Law Quarterly Review), *Collected Papers*, I, 407–457.

[7] F. Pollock & F.W. Maitland, *History of English Law* (2nd edn. 1898), chapter 4, II, 1–183.

[8] S.F.C. Milsom, *The Legal Framework of English Feudalism* (Cambridge 1976); "Maitland and the Grand Assize" (1995) *Haskins Society Journal*, vol. 7 (Woodbridge & Rochester NY 1997), 151–177.

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In particular the wordy writ of novel disseisin includes phrases which are irrelevant to a general possessory remedy, but which are exactly appropriate in a remedy specifically designed to protect tenants against abuse of a power in their lords to take the land (usually as a means of pressure but sometimes even permanently) for failure of tenurial duty. That power was exerciseable without writ in the lords' own courts; and, being incompatible with the vision of a tenant as "owner", its very existence has been overlooked by historians. But it is beyond doubt;[9] and the earliest plea rolls contain cases in which the defendant to an assize is a lord explicitly justifying the taking as an exercise of that power and reciting the procedure followed by his court. Great faith in coincidence is required still to believe that the assize was conceived as a general possessory remedy.[10] It was conceived in a world in which what tenants had was not ownership but tenure, like that of today's judge or professor; and that tenure was protected by a due process consisting in the judgment of their peers in their lords' courts. That the invocation of *judicium parium* by *Magna Carta* should have become just a puzzle for historians is a measure of the unseen shift in the assumptions of society.[11]

Is it possible that the powers of lords also have something to do with rights of entry, as Blackstone believed?[12] We begin by

[9] There are clear statements in *Glanvill* IX 1, IX 8; and cf. VII 12, VII 17. These scattered statements could hardly have been overlooked if *Glanvill* had brought them together in a focussed discussion. But the matter was peripheral for one expressly focussing on the king's court, especially since this was the routine business of lords' courts—unlike the exceptional cases begun by the king's writ (cf. the frequent claim by a tenant that he owed suit of court only when a thief was to be judged or the king's writ heard). Not only was it peripheral for *Glanvill*: it was among the assumptions of everyday life shared by the writer and his readers, but altogether lost to historians.

[10] The most obvious correspondences between the words of the writ and the process of lords' courts are:- "unjustly and without judgment" (n. 3 above); the provision about the defendant's bailiff; and the order for the chattels to be put back (the courts could resort to the land only after a series of distraints by chattels). Historians have suggested other (and rather strained) explanations for each of these points one by one, without regard for the debt being run up with coincidence, *e.g.*, P.A. Brand, "Milsom and After" in *The Making of the Common Law* (London & Rio Grande 1992), 203 esp. at 222–223; D.W. Sutherland, *The Assize of Novel Disseisin* (n. 5 above) esp. at 30–31. For cases in the early rolls in which the defendant to an assize was indeed the plaintiff's lord who expressly relies on the due process of his court (which he must recite, and which his court has to attest) see *Legal Framework* (n. 8 above), 8–15.

[11] *Magna Carta* (1215) c. 39, (1225) c. 29. The puzzle was itself a result of novel disseisin. One effect of the assize was that lords' courts ceased to push their process beyond the taking of chattels (which in turn came to be seen as a self-help remedy independent of any judgment), so that the conditional "tenure" of tenants began indeed to look like unconditional "ownership", and the old due process invoked by the Charter lost its meaning. Thorne noted a similar effect of mort d'ancestor on the perception of inheritance, n. 24 below.

[12] *Commentaries*, III, 174–175 (cf. II, 209): "the party entitled may make a formal, but peaceable, entry thereon, declaring that thereby he takes possession; which notorious act of ownership is equivalent to a feodal investiture by the lord". Maitland rejected the feudalism in Blackstone as a matter of history, but nevertheless saw it as largely responsible for the clarity and coherence of Blackstone's account of property law; *Collected Papers*, I, 480 at 488–489; "Two Lectures ..." (1889) printed in [1966] *Cambridge Law Journal*, 54 at 65–70. For references showing Maitland's contempt for feudalism see "The History of English Law:

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repeating a linguistic point which has been made elsewhere. In various contexts, most obviously the statutes *Quia emptores* and *De viris religiosis*, it is clear that what is "entered" is not a physical plot of land but the fee of a lord;[13] and the writs of entry make most sense on that basis. They are *precipe* writs initiating action in the king's court but for some reason not depriving lords of their jurisdiction within the ban of *Magna Carta*.[14] The reason traditionally given is that they are merely "possessory" and so do not trench on the jurisdiction of lords over disputes about "ownership". Even assuming the possessory/proprietary framework, this explanation is heavily dependent upon a supposed primacy among writs of entry of that based on a disseisin (when a party had died before the assize could be concluded). But we now know that writ was rare and not at all central, and that the great majority of writs of entry were based on a spent or defective grant.[15]

One inevitably thinks about grants in modern terms: but before the statute *Quia emptores* in 1290 nearly all grants were by subinfeudation, downward rather than horizontal.[16] The grantee did not take his grantor's place as tenant of the grantor's lord: instead a new sub-tenure was created, so that grantor continued as his lord's tenant and grantee became tenant of grantor. Suppose that A claims land from B on the ground that B has no entry except by grant from A's father who made it while *non compos mentis*. Assuming subinfeudation the mention of that entry in the writ indeed shows that A's lord is not being deprived of his jurisdiction, not because this claim is somehow "possessory"[17] but because the dispute is not between rival claimants to be the lord's tenant. A is

Centenary Essays on 'Pollock and Maitland'", (1996) 89 *Proceedings of the British Academy* at 246.

[13] S.F.C. Milsom, *The Legal Framework of English Feudalism* (Cambridge 1976), 92–93.

[14] *Magna Carta* 1215 c. 34; 1225 c. 24.

[15] G.D.G. Hall, "The Early History of Entry sur Disseisin", *Tulane Law Review*, xlii (1968), 584; S.E. Thorne, "Translator's Introduction", *Bracton*, III, xxiii–xxix; S.F.C. Milsom, "Maitland and the Grand Assize" (1995) *Haskins Society Journal*, vol. 7 (Woodbridge & Rochester NY 1997), 151 at 171–175.

[16] Maitland was clear that early substitutions were made by fine; and had it not been for a single statement in *Bracton* he would have regarded "private" substitution without the lord's consent as virtually unthinkable before *Quia emptores*. It now seems clear that Maitland misunderstood *Bracton*'s statement. The waters were further muddied by Plucknett, who took Magna Carta (1217) c. 43, (1225) c. 36 as showing that already by 1217 a tenant could substitute even a religious house without his lord's consent. For discussion and references see S.F.C. Milsom, *The Legal Framework of English Feudalism* (Cambridge 1976) chapter 4, especially at 103–104 and 146–153. When Maitland referred to substitutions being made by fine, he of course had in mind the classical fine in the king's court as a known conveyancing device. But it is likely that "fines" were first made in lords' courts, with a substitution being validated by the peers of the fee and taking written form (if any) in a charter witnessed by them.

[17] S.F.C. Milsom, *The Legal Framework of English Feudalism* (Cambridge 1976), 88–102; "Maitland and the Grand Assize" (1995) *Haskins Society Journal*, vol. 7 (Woodbridge & Rochester NY 1997), 151 at 170–175.

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his lord's tenant and will remain so whoever wins this lawsuit; and the question is whether by reason of the grant B is entitled to be A's tenant. Indeed since B does not hold of A's lord, A's lord cannot even summon him to his court. On that basis the writs of entry fall into place beside the *precipe* writs *in capite* and *quia dominus remisit curiam* as showing on their face that there is no breach of the prohibition in *Magna Carta*.[18]

Now consider the same case on the basis that A's incapable father had made his grant to B after the statute *Quia emptores*, by which subinfeudation was prevented and any grant in fee simple could only substitute grantee for grantor as tenant of the grantor's lord. The dispute would now indeed be between rival claimants to be tenant of the lord of whom A's father had held; any *precipe* writ would fall within the ban of the Charter; and A should in principle make his claim by writ patent in the lord's court, whence it could be removed by tolt to the county and thence by *pone* to the king's court.

But life had left principle behind. This way of proceeding, always slow and cumbersome, was by the time of *Quia emptores* largely out of use. So how should A make his claim now? He would have to proceed in the same way as one making a claim which did not arise out of a questionable grant. The disabling of most writs of entry by *Quia emptores* did not create the need for a new standard vehicle for claims (though it must have increased the demand). The standard vehicle that developed was the right-of-entry mechanism, and its roots appear to be earlier than *Quia emptores*.

Other linguistic considerations now become relevant. One is simple but basic. "Right of entry" is not a phrase used in the year books: their phrase is *entre congeable*, permissible entry. Another harks back to the writs of entry. The seignorial connotations of "entry" have already been noted: it was not a geographical plot of land that was entered but the fee of a lord. But that is still to think of an entry as a definite past event; and almost everybody, including Maitland[19] and the present writer,[20] has unthinkingly represented writs of entry as cast in those terms: "into which the holder had no entry except ...". But Registers and plea rolls show the word as "has" rather than "had", *habet* not *habuit*. Of course

[18] But (as original writs) the writs of entry were not a sudden invention. They seem to have evolved from essentially judicial writs summoning juries to pronounce on special issues reached in writs of right. See *The Legal Framework of English Feudalism* (preceding note) at 95–102.

[19] F. Pollock & F.W. Maitland, *History of English Law* (2nd edn. 1898), II, 64: F.W. Maitland, *The Forms of Action at Common Law* (edn. 1936), 85.

[20] *Historical Foundations of the Common Law*, 2nd edn., 143.

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this is a verbal niggle, but it is in the nature of law that questions often show up in verbal niggles; and the possibility should at least be considered that "having entry" was not a momentary event but a continuing condition flowing from the event. For whatever it may be worth there is a modern analogy: privileged individuals were (and in some circles perhaps still are) occasionally said to "have the entrée" to the royal court or some exclusive household or society; and such a privilege is conferred by a person and does not flow from any general rule.

If "entry" meant entry into the fee of a lord, and an entry is said to be *congeable*, the person who could give *congé* was presumably the lord. Of course rights of entry continued to be central to lawsuits claiming land long after lords ceased to play any real part; and the hypothesis is that what started as an entry authorised (or at least accepted) by an actual lord became formalised as *congeable* if a lord could have authorised it.

We begin with an actual lord who featured in an assize of novel disseisin in 1222. He was not party and we know of his existence only because the recognitors were allowed to return a special verdict;[21] but it was his authority that gave seisin to one party rather than another. A tenant having six acres gave an acre and a half to one of his two daughters and her husband on their marriage, and promised that they should have the rest after his death. Later the other daughter married, and this second couple remained with the father until he died. The first husband then persuaded the lord to let him and his wife have the remaining four and a half acres, which however were soon annexed by the second couple; and the recognitors give a breathless account of takings and retakings over the next four years "So they say they do not know which of them was in seisin as of free tenement, but they say clearly that" the father "died seised as of fee". And because the first couple (defendants to the assize) "had seisin through the chief lord", and the plaintiff "had nothing except by his force and without warrant" the court found against the plaintiff "because he had no warrant for his seisin".[22]

But it is necessary to place such considerations in a wider framework, starting from first principles. The right-of-entry

[21] *Bracton's Note Book*, no. 1792, translated in J.H. Baker & S.F.C. Milsom, *Sources of English Legal History* (London 1986), 33. Because of the complexity of the issues which might be hidden in a general verdict, and of the fear of an attaint with its ruinous consequences, the Statute of Westminter II in 1285 by c. 30 was to give recognitors a statutory right to insist on a special verdict in novel disseisin. Before that it was in the discretion of the justices.

[22] The second daughter might still have had a claim for the whole of the $4\frac{1}{2}$ acres as "hearth-child" or for a half of the 6 acres as parcener with her sister. But having gone in without the lord's warrant she and her husband were not now seised. Cf. *Curia Regis Rolls*, XVIII, no. 1958.

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mechanism was never confined to retrieving land lost by disseisin. It was a general way of making a claim, a more direct alternative (though not always available even to one entitled) to bringing a real action. All the real actions were based upon the seisin of an ancestor (exceptionally upon that of the claimant himself); and the claim was to be that ancestor's heir. Even in the writs of entry, which sought to nullify a supposed entitlement of the defendant, the affirmative claim was as heir of the ancestor who had made the defective grant (or whatever). If therefore what we are looking at was just another way of asserting an affirmative title, that title would have been as heir of an ancestor who had been seised.

Inheritance in English law became a magical event transacting itself in a vacuum. Until 1897, when the Land Transfer Act channelled title to the heir through the personal representatives, the death of the ancestor passed title directly to the heir who went in with no official authentication, no intervening hands, and no opportunity for challenge except by litigation *ex post facto* at the suit of another claimant. This result, extraordinary to anyone not brought up in the common law system, was the residue left when the original intervening hands and official authentication had been dissolved out, when the actual part played by lords in the routine of inheritance had been eroded to nothing. But it had once been everything, and we have been too ready to assume that the change was brought about not by slow erosion but all at once by legislation of 1176.

Before 1176 a lord would in principle always take the tenement into his own hand on the death of his tenant. If there was any doubt who was heir, he would keep it until the doubt was resolved. Even if there was an undoubted male heir of full age the lord would not deliver seisin to him until the heir did homage and paid or gave security for his relief: not until then would the inheritance actually happen. If the undoubted male heir was infant, the lord would again not deliver seisin until the heir did homage, and that would not happen until the heir was of age and able to do the service. If the heir was female, the lord would not deliver seisin until he had found her a husband who would do the service, whose homage he would take in the woman's name.[23] And if there was no heir at all, the tenement would remain in the lord's hand as his escheat unless and until he granted it away to a new tenant of his free choice.

In 1176 the Assize of Northampton made changes which may have turned out even larger than could be seen at the time. In the

[23] This homage was the basis of "curtesy", the widower's right to hold his dead wife's land so long as he lived even if there was an heir of full age.

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case of the undoubted adult male heir the lord was not to stop him going or staying in, before doing homage and paying relief (and enforcement of this was the first aim of the assize of mort d'ancestor).[24] In the case of an infant male, the lord was to take his homage before taking the land into his own hand in a real sense.[25] He would still take it into hand (and keep the profits) to make up for the service the infant could not do; but now having taken homage he was holding in the infant's name, not his own. The inheritance had already happened, and it was the infant rather than the lord who was seised (something which was to complicate protection of the lord's "wardship" as an essentially new legal entity).

This legislation did not of course apply to the king, whose treatment of the heirs of tenants-in-chief remained as fossil evidence of the old order.[26] Instead of "wardship", for example, the *Dialogus de Scaccario* speaks of "*escaeta cum herede*" by which the king held heir and inheritance in his hand until the heir came of age and could receive the inheritance by doing homage and taking livery of seisin.[27] And when in 1267 the Statute of Marlborough followed the Provisions of Westminster in augmenting yet further the rights of heirs in general, it added a clause reaffirming the king's special rights over the heirs of tenants-in-chief.[28] Royal control (and exploitation) of inheritance by tenants-in-chief on the old pattern was to last for centuries, reaching its procedural culmination under the Tudors in the Court of Wards and Liveries.[29]

But even in the case of the undoubted adult male heir the lord's taking into hand continued to have a shadowy existence. In the words of a statute ninety years after Northampton, he had a "simple seisin in recognition of his lordship".[30] The phrase "simple seisin" appears in plea rolls from early in the century, sometimes in

[24] Assize of Northampton, c. 4, text in *Stubbs' Select Charters* (9th edn. reprinted 1946), 179–180. For the ultimate effect of mort d'ancestor on the perception of inheritance, see S.E. Thorne, "English Feudalism and Estates in Land" (1959 *Cambridge Law Journal*) reprinted in *Essays in English Legal History* (London & Ronceverte 1985), 13–29. The assumption that this assize was another possessory remedy has hidden its original role in protecting tenants against their lords.

[25] Cf. *Glanvill* IX 1, IX 4.

[26] *Glanvill* IX 6. For a related fossil see *Glanvill* VII 10, discussed in S.F.C. Milsom, "The Origin of Prerogative Wardship" in *Law and Government in Medieval England and Normandy*, ed. G. Garnett and J. Hudson (Cambridge 1994), 223–244. There are various incongruities in Mr. Hall's translation which follows that of Beames. They partly arise from adherence to the normal grammatical rule referring a personal pronoun to the person last named. But that rule may always be overridden when it is obvious that the person denoted was the subject of the passage as a whole (in this case obvious even without the rubrics "The wardship of chief lords").

[27] *Dialogus de Scaccario*, ed. C. Johnson 1950, 94.

[28] Stat. Marlborough c. 16; Provisions of Westminster, c. 9.

[29] H.E. Bell, *The Court of Wards and Liveries* (Cambridge 1953).

[30] Statute of Marlborough, c. 16, following Provisions of Westminster, c. 9. For examples of a lord's action on the death of his tenant appearing in early plea rolls, sometimes in appeals of

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other contexts[31] but usually in relation to a lord's actions on the death of his tenant;[32] and it presumably represents the prescription in *Glanvill*:[33] "Heirs of full age may, immediately after the death of their ancestors, remain in their inheritance; for although lords may take into their hands both fee and heir, it ought to be done so gently (*ita tamen moderate*) that they do no disseisin to the heirs". What it probably comes down to is that the lord must not take any actual profit.[34]

If there is any doubt who is heir, there is no need for verbal niceties and nothing shadowy about the lord's position. Suppose he is confronted by rival claimants, or is confronted by one whose claim would be beyond doubt if only it was certain (for example) that an elder brother was dead without issue: in such a case the lord should retain the tenement in his own hand until the true heir makes good his claim.[35] What he should not do is take anyone's homage before the doubt is resolved: if he takes homage (or even accepts service) from one who turns out to be the wrong man, he will be bound to warrant him and so provide him with another tenement of equal value if and when the right man recovers.

Plea rolls of the 13th century show lords taking an active part in cases of doubt, which might arise in various ways. In 1243 for example the substantive question was between two brothers of the dead man, the elder of whom was in the allegiance of the king of France. After the lord had taken the tenement into hand the younger brother went in and brought the assize (which was adjourned *coram rege*) when the lord then put him out.[36] A special and recurrent doubt was that of the *casus regis*, so called because it affected King John's title to the crown as heir of his brother Richard I.[37] Did the issue of a dead elder son (or brother) have a better claim than a living younger son (or brother)? Different lordships followed opposite customs, no doubt because the nephew seemed to have the stronger claim to succeed to the land considered just as property (and it was increasingly so considered as service

felony, see S.F.C. Milsom, *The Legal Framework of English Feudalism* (Cambridge 1976), 168–170.

[31] *Curia Regis Rolls*, V, p. 169 (*simplex* contrasted with *plenaria seisina*); *Bracton's Note Book*, no. 348.

[32] *Curia Regis Rolls*, VII, pp. 168–73; cf. *Rolls of the Justices in Eyre for Lincolnshire 1218–19 and Worcestershire 1221*, 53 Selden Soc. (1934), no. 256.

[33] VII 9.

[34] Cf. *Roll & Writ File of the Berkshire Eyre of 1248*, 90 Selden Society (1973), no. 388.

[35] *Glanvill* IX 6. Cf. VII 9 where the same is prescribed if there is doubt whether the heir is of age.

[36] *Curia Regis Rolls*, XVII, no. 213.

[37] When Richard died his next brother Geoffrey of Brittany was already dead but had left a daughter Eleanor and a posthumous son Arthur. John was Geoffrey's younger brother.

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declined in importance), but he would more often be an infant unable to do the service for which the land was in principle held.

King John is believed to have procured the death of his nephew Arthur; but Arthur had a sister, and until she died in 1241 such cases posed an embarrassment. *Glanvill* thought the king's court should not interfere (except presumably when the dead man was tenant-in-chief); but since he was writing while King Richard was still alive, he may not have had that particular embarrassment in mind. So what did he have in mind? To modern eyes his Roman tag *melior est conditio possidentis*[38] conjures up a mere scramble between the rivals; but this is not the only context in which modern eyes read *Glanvill* with the assumptions of a modern or a Roman world, not those of *Glanvill*'s world.[39] The Assize of Northampton was little more than a decade old, and the writer probably meant only that in such cases there should be no interference with the customary result reached within the lordship.

In 1226 the dead tenant's younger son went in, only to be put out by his nephew who in turn was put out by the lord "for the dispute between the parties because each made himself heir".[40] In an assize against the lord the recognitors find that the nephew was not disseised because never seised. The reason suggested for this by Maitland is that the nephew had been in for only three days, not *Bracton*'s four;[41] but the recognitors link the lack of seisin causally ("*et ideo*") with the lord's action and its reason.

In 1239 and 1242 the same doubt arises, but with a further twist. In each case there is disagreement about which of two lords in the place was the lord of whom the dead man had held, and on the *casus regis* question the two lordships were evidently following contrary customs. In 1239 the dead man's younger brother was accepted by "his" lord, though "*salvo jure cujuslibet*"; and the other lord championed the daughters of a dead intervening brother. Each lord took part in many ejections of the other side, and eventually the younger brother brought the assize against the lord championing the nieces (and against that lord's men). No decision is recorded, but the recognitors say the dead man had indeed held of the lord championing the younger brother; and on that basis one may conjecture that the younger brother had been seised and therefore disseised.[42]

[38] *Glanvill* VII 3.
[39] Cf. the surprising omission by historians to pay any attention to the scattered statements in *Glanvill* about the power of a lord in his own court without writ to take the tenement in case of default, above, n. 9.
[40] *Curia Regis Rolls*, XII, no. 2182; *Bracton's Note Book*, no. 1731.
[41] *Bracton's Note Book*, III, p. 568, n. 3.
[42] *Curia Regis Rolls*, XVI, no. 1173.

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The 1242 case is particularly instructive as showing the chancy nature of the evidence. Neither lord is party to the assize, which is brought by the dead man's sisters against one acting as guardian for the issue of a dead brother. It turns out that on the death the sisters went in on the authority of the lord of whom they say the dead man had held, and were ejected by the defendant who acted on behalf of the issue of the dead brother and on the authority of the other lord. But we know all this only through the pertinacity of the defendant. When the assize was taken in the country the recognitors found a general verdict for the plaintiff sisters; and if the case had ended with the justices of assize giving judgment accordingly we should know nothing of the relationship between the parties or of even the existence of the lords. We could easily imagine that casual "theft" of land which historians have usually conjured up for novel disseisin. The story came onto the record because the defendant procured a "certification", which brought the justices of assize and the recognitors to rehearse the whole business in the bench. There the clerks recorded the recognitors' account of events, which ended with a "we-told-you-so" repetition of their original verdict; but final judgment was still adjourned.[43]

The likelihood that such seignorial action would not show up in plea rolls is emphasised by a tract thought by its editors to have been written about the same time. It set out to illustrate for laymen the working of various kinds of lawsuit in various courts;[44] and in rehearsing an imaginary assize of novel disseisin it "reports" (which plea rolls rarely do) what is said in court. The imaginary plaintiff says only that he was in peaceful seisin until the defendant disseised him: he does not say how he came to be there, and perhaps it did not matter. The defendant says that his father had died seised and the chief lord thereupon put him in seisin. If this had been a real case there would have been an unexplained verdict for the one side or the other, and the record would not even have mentioned the lord. But he was the central figure in what from the nature of the tract one would suppose to be a typical case.

What we seem to be seeing is a change by which lords cease to act in their own persons or by their men and so do not become parties to the assize: they just authorise the person they accept as heir to act in his own interest. The lords are still real, but in the absence of a special verdict or a certification they have become invisible. A note attributed to the later years of Edward I takes the

[43] *Curia Regis Rolls*, XVII, no. 1013.

[44] "Consuetudines diuersarum curiarum" in *Select Cases of Procedure without Writ under Henry III*, 60 Selden Society (1941), cxcv-cciii at cxcix-cc.

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fictionalisation even further.[45] On the death of a widower holding his dead wife's land by the curtesy, the lord takes the tenement in the name of whoever is the woman's heir, but is then put out: it is the heir who can bring the assize "because the seisin which the chief lord took counts as (*satis sufficit ad*) the seisin of whoever has the right". Perhaps the final step was for lords to become entirely unreal, figments conjured up first by the parties and then by the facts of the case. It is not a process for which we can expect much direct evidence. An entry of 1244 is merely tantalising: in an assize against William and Aaron (presumably in under some gage arrangement with William), William "comes and says he had entry in the aforesaid land". The clerk must have known what that meant, but we can only guess.[46]

If entry was *congeable* when a lord had given or (later) could have given authority to one going in as heir, it would follow that no later claimant could enter upon an earlier by colour of the same authority. There could be no right of entry upon one who had gone in as heir, a proposition later to appear as the dogma that an entry was "tolled" by "descent cast". The simplest case would be a disseisin followed by death of the disseisor: disseisee could not enter upon disseisor's heir but would have to bring a writ of entry.[47] We may have a less straightforward example of 1243, though once again we would probably know nothing of the facts if the party who at first lost the assize had not procured a certification. On the death of her tenant the lady of the fee had taken into hand both his son (or rather one the dead man had recognised as his son) and the tenement, and had sold the wardship of both, which was later sold again. The last assignee arranged the marriage of the son who was apparently in the tenement. Then the dead tenant's sister and her husband, evidently alleging that the son was bastard or otherwise a stranger, persuaded the (presumably successor) lord to take the husband's homage and put them in seisin; and it was they who brought the assize when the son ejected them. The recognitors first found for the sister and her husband, but when the facts are rehearsed *coram rege*, it was decided that "the seisin in which they were put by the aforesaid lord of the fee is null".[48]

[45] YB 32 & 33 Ed.I (R.S.), 518. The note is in Latin and one of a group of instructional notes included among transcripts of enrolments in a year book manuscript.

[46] *Curia Regis Rolls*, XVIII, no. 1966.

[47] *E.g.* YB 44 Lib. Ass. pl. 34, f. 293. This disseisee had not made "continual claim" in the six years before disseisor died.

[48] *Curia Regis Rolls*, XVII, nos. 148, 263. It is possible that similar reasoning lay behind the other common event which "tolled" a right of entry, namely a "discontinuance". At common law if tenant in tail or husband seised in right of his wife or abbot seised in right of his house made a grant not expressly limited to his own life, the person next entitled could do nothing until the grantor died; and then he could not enter but must bring formedon or writ of entry. At any rate in the usual case in which the discontinuing grant purported to be in fee simple,

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The point of this paper may be sharpened by returning to the theory it questions. That theory would hardly have taken hold had there been nothing but *Bracton*'s talk about four days. When novel disseisin verdicts recite the facts they are often explicit about the period for which a party had been in seisin, and this would be congruous with some ripening process. In general any seisin needed to be demonstrated as a reality, for example by taking the profits. And this was particularly necessary with a livery of seisin by grantor to grantee: the grantor must altogether remove himself and his family and belongings;[49] and the grantee must demonstrably have assumed actual control, which would take time.[50]

But there was one person who became seised instantly (the defining characteristic of a right of entry), and that was the heir entering as such. In 1292 it was said that "one hour in the day was sufficient to give a man good seisin. But this must be understood where he takes by descent, and not by feoffment".[51] And in 1305 not even the one hour was needed: "a mere placing of the foot conferred seisin on the true heir". In that case the plaintiff brought mort d'ancestor claiming as heir on the death of his mother's brother, and judgment in his favour was reversed on the ground that the uncle was not last seised: after his death the plaintiff's mother had herself been seised. She had gone in claiming as her brother's heir while his corpse was still in the house, but was ousted when it was carried out half an hour later; and the assize justices had thought that the short time and the circumstances forbade the conclusion that she had become seised. But the court *coram rege* ruled otherwise: as her brother's heir she had been seised and therefore disseised, and the plaintiff must lose in mort d'ancestor as his uncle's heir but would be able to recover by writ of entry *sur disseisin* as his mother's.[52]

To conclude: the hypothesis of this paper is that the part played by lords in the mechanics of inheritance is the true origin of rights of entry. But it ceases to be an active part: the lord does not put anybody in, only gives his authority to the person he accepts as

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the grantee would by *Quia emptores* immediately (and rightly so long as the grantor lived) become as much tenant of the grantor's lord as if he had come in by inheritance.

[49] *E.g.* YB 20 & 21 Edw. I (R.S.), 80–82 (elder son trying to undo father's *se demisit* to younger son); *ibid.*, 112.

[50] This probably flowed from the institution of novel disseisin itself, creating a need for changes of holding to be known to men of the countryside and not just to peers of the fee. Symbolic livery, often in the lord's court, seems previously to have been common and perhaps general, S.E. Thorne, "Livery of Seisin" (1936 Law Quarterly Review), *Essays in English Legal History* (London & Ronceverte 1985), 31–50.

[51] YB 20 & 21 Edw.I (R.S.), 8–10.

[52] YB 33–35 Edw.I (R.S.), 52–54. Had the mother not died she could have recovered in novel disseisin. Had she not been disseised the plaintiff could have recovered as her heir in mort d'ancestor.

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heir. And in the end the heir (who alone will figure in any lawsuit) will have a right of entry if a supposed lord could have given supposed authority. We come back to Lewis Carroll: the feudal framework in England faded away slowly like the Cheshire Cat, leaving most of the peculiarities of our land law by way of grin. Two of them seem to belong together: the peculiar rights of entry and the even more peculiar vision of inheritance as an autonomous event by which the heir succeeded without any interposition of external authority. These and many other anomalies stem from the pervasive mystery of seisin when it is assumed to be a variant of abstract possession in a world already ordered only by abstract rules. The starting-point was a world of relationships in which by definition a tenant could be seised and disseised only by his lord.

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